Nos. 14-556, 14-562, 14-571, 14-574

In The Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,
Petitioners,
v.
RICHARD HODGES, DIRECTOR, OHIO DEP'T OF HEALTH, ET AL.
Respondents.

VALERIA TANCO, ET AL.,
Petitioners,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.,
Respondents.

APRIL DEBOER, ET AL.,
Petitioners,
v.
RICHARD SNYDER, GOVERNOR OF MICHIGAN ET AL.,
Respondents.

GREGORY BOURKE, ET AL.,
Petitioners,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, WILLIAMS INSTITUTE SCHOLARS OF SEXUAL ORIENTATION AND GENDER LAW, AND WOMEN'S LEGAL GROUPS IN SUPPORT OF PETITIONERS

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I. INTEREST OF AMICI CURIAE[1]

Amici Curiae are the National Women's Law Center, California Women Lawyers, Connecticut Women's Education and Legal Fund, Center for Reproductive Rights, Equal Rights Advocates, Michigan Association for Justice, National Association of Women Lawyers, National Partnership for Women and Families, Women's Bar Association of the District of Columbia, Women's Bar Association of Illinois, Women's Law Center of Maryland, Women's Lawyer Association of Michigan, and professors of law associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. Amici have substantial expertise related to equal protection, discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise bears directly on the issues before the Court. Descriptions of individual Amici are set out in the Appendix.

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[1] Prior to his representation of the *Tanco* Petitioners in the pending action, attorney David Codell co-authored portions of related briefs on the same issue submitted in this Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and in the Ninth Circuit. He has not authored, revised, or edited any portion of this brief since commencing the *Tanco* representation, nor has any other party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparation or submission of this brief, nor did a person other than Amici or their counsel contribute money intended to fund preparation or submission of the brief. All parties have consented to the filing of this brief.

II. SUMMARY OF ARGUMENT

Under the federal Constitution's equal protection guarantees, laws that classify on the basis of sex are subject to heightened judicial scrutiny and cannot stand absent an "exceedingly persuasive justification" and a showing that such laws substantially further important governmental interests. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) [hereinafter "VMI"]. In particular, the government may not enforce laws that make sex classifications based on gender stereotypes or gender-role expectations, including those regarding roles that women and men perform within the family, whether as caregivers, breadwinners, heads of households, or parents. Courts have recognized that sex classifications warrant heightened scrutiny because the legal imposition of archaic and overbroad gender stereotypes arbitrarily harms women and men by limiting individuals' abilities to make decisions fundamental to their lives and their identities.

Laws that discriminate based on sexual orientation, like laws that discriminate based on sex, frequently have a basis in overbroad gender stereotypes about the preferences and capacities of men and women.[2] Lesbian, gay, and bisexual persons long have been harmed by legal enforcement of the expectation that

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[2] Amici note that, while this issue is not presented in this case, laws that discriminate based on gender identity, including transgender status, are also premised on overbroad gender stereotypes and should be subject to heightened scrutiny. *See generally Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding discrimination against a transgender individual based on gender nonconformity constitutes sex discrimination and collecting cases in accord).

an individual's most intimate relationship will be and should be with a person of a different sex. Such presumptions underlie many laws that discriminate based on sexual orientation, including those at issue here, and cause lesbian, gay, and bisexual persons to experience both practical and dignitary harms of constitutional magnitude. These laws communicate to them and to the world that there is something wrong with a core part of their identity, that they do not measure up to what a man or a woman supposedly should be, and that their most important relationships are "less worthy," *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) [hereinafter "*Windsor*"], than the relationships and marriages of different-sex couples.

The laws challenged here make sex classifications in prescribing who may marry and whose marriages shall be recognized, and thus should be reviewed under heightened scrutiny, like any other law that classifies on the basis of sex. But if these laws are instead considered to classify on the basis of sexual orientation, the result is the same. Just as the Constitution requires heightened scrutiny of laws that enforce the roles that men and women perform within marriage on the basis of gender stereotypes, the Constitution demands close scrutiny of laws based on gender stereotypes that restrict an individual's liberty to decide whom he or she marries and with whom he or she forms a family. Accordingly, this Court should hold that laws that discriminate based on sexual orientation warrant heightened judicial scrutiny and that the laws challenged here cannot withstand such scrutiny.

III. ARGUMENT

Over the last four decades, application of heightened scrutiny to laws that discriminate based on sex has served as an important bulwark in protecting individuals' liberty to participate in family life, education, and work, free from legally imposed gender roles. Lesbian, gay, and bisexual persons, however, are still subject to laws that burden their liberty to enter into relationships, including marriage, with the person to whom they may feel closest—a person of the same sex. These laws deny lesbian, gay, and bisexual persons full citizenship in profound ways.

Rather than serving any important governmental interest, marriage laws that discriminate against same-sex couples reflect the gender-role expectation that women will form intimate relationships with men, and that men will form such relationships with women, as well as the stereotype that same-sex spouses are inferior parents because they cannot fulfill particular gender roles. "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). The decisions whether and with whom to enter into intimate relationships, including marriage, and whether and with whom to raise children, are central to individual liberty under the Constitution. The government has no authority to restrict these choices based on gender-based stereotypes or expectations, just as it has no authority to dictate the roles that men and women fill within marriage on such bases. This Court repeatedly has held that the government may not justify sex discrimination by an asserted

interest in perpetuating traditional gender roles in people's family and work lives. Nor is sexual orientation discrimination justified by a rigid and exclusionary gender-role expectation that an individual will only partner with someone of a different sex.

Two of the laws at issue here define who may enter into marriage on the basis of sex: a man may only marry a woman and a woman, a man. The remainder make sex classifications in providing that only marriages between a man and a woman shall be recognized under state law. As a result, the Court must review these laws with heightened scrutiny, because they constitute classifications based on sex. *See Latta v. Otter*, 771 F.3d 456, 479-85 (9th Cir. 2014) (concurring opinion) (prohibition of same-sex marriage constitutes sex classification subject to heightened scrutiny); *Waters v. Ricketts*, No. 8:14-cv-356, 2015 WL 852603, at *14-15 (D. Neb. Mar. 2, 2015) (plaintiffs are likely to prevail on the merits of challenge to Nebraska's marriage ban because the law constitutes impermissible gender discrimination); *Jernigan v. Crane*, No. 4:13-cv-00410 KGB, 2014 WL 6685391, at *23-24 (E.D. Ark. Nov. 25, 2014) (prohibition of same-sex marriage constitutes sex classification subject to heightened scrutiny); *Rosenbrahn v. Daugaard*, No. 4:14-CV-04081-KES, 2014 WL 6386903, at *10-11 (D.S.D. Nov. 14, 2014) (same claim survived motion to dismiss); *Lawson v. Kelly*, No. 14-0622-CV-W-ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) (prohibition of same-sex marriage constitutes sex classification subject to heightened scrutiny); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (same), *aff'd*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014);

cf. Loving v. Virginia, 388 U.S. 1, 9 (1967) ("In the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.").[3]

Even if such laws are not considered sex discrimination per se, however, this Court should subject laws that deny rights or opportunities based on sexual orientation to heightened scrutiny for several reasons, including the close relationship between sex discrimination and sexual orientation discrimination, which is the focus of this brief.

In the cases at bar, the district courts uniformly concluded that the challenged marriage laws discriminated in violation of the Equal Protection Clause, and three of those courts expressly held that heightened scrutiny properly applies to sexual orientation classifications.[4] On review of these

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[3] The Amicus Brief of Constitutional Law Scholars Andrew Koppelman *et al.* on Sex Discrimination sets out this analysis in greater detail.

[4] *See Henry v. Himes*, 14 F. Supp. 3d 1036, 1054 (S.D. Ohio 2014) (applying heightened scrutiny to Ohio's marriage bans because they classified on the basis of sexual orientation); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769 (M.D. Tenn. 2014) (applying rational basis review and concluding equal protection claim likely to succeed); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 548-49 (W.D. Ky. 2014) (noting that gay and lesbian individuals share many characteristics of other groups afforded heightened scrutiny, but concluding Kentucky's ban could not survive even rational basis review); *Love v. Beshear*, 989 F. Supp. 2d 536, 547 (W.D. Ky. 2014) (comparing sexual-orientation discrimination to gender discrimination and concluding heightened scrutiny applied but that marriage bans failed under rational basis

decisions, however, the Sixth Circuit became the first federal appellate court to uphold bans on marriage and marriage recognition for same-sex couples since this Court's decision in *Windsor*. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (Jan. 16, 2015). In concluding that same-sex couples should look not to the courts but to "state democratic processes" to protect their rights, the Sixth Circuit opinion declined to articulate the relevant doctrinal framework to analyze the constitutional challenges and thus "wholly fail[ed] to grapple with the relevant constitutional question." *Id.* at 421 (Daughtrey, J., dissenting).

Were this Court to apply the standard of review applicable to sex discrimination, the laws challenged here would be invalid unless the government could show an "exceedingly persuasive" justification for them, including a showing "at least that the [challenged] classification[s] serve[] important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" without "rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533 (first alteration in original)

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review); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014) (concluding applicable standard of scrutiny need not be determined because Michigan's laws did not survive even rational basis review); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 991 (S.D. Ohio 2013) (holding heightened scrutiny applies to sexual-orientation classifications but marriage bans fail even rational basis review).

(citations and internal quotation marks omitted). These laws cannot withstand such scrutiny.[5]

A. This Court Adopted Heightened Scrutiny for Laws That Discriminate Based on Sex Because Such Laws Are Typically Based on Gender Stereotypes.

Again and again, this Court has recognized that laws that discriminate on the basis of sex typically rely on gender-based expectations about the roles or conduct that is supposedly natural, moral, or traditional for women and men, and that legal enforcement of these stereotypes is incompatible with equal opportunity. A repeated refrain runs through modern case law addressing measures that deny rights or opportunities based on sex: such laws warrant "skeptical scrutiny," *VMI*, 518 U.S. at 531, because "of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender, or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (internal quotation marks omitted).

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[5] Amici also note that these laws lack any rational basis. Moreover, were this Court to employ strict scrutiny for laws that discriminate based on sexual orientation—the standard of review for laws that classify based on race and national origin, *e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005)—the challenged measures would fail, for they are not narrowly tailored to further a compelling state interest.

For example, the first case in which Justices of this Court expressly subjected a sex-based classification to heightened scrutiny, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality), recognizes that "our Nation has had a long and unfortunate history of sex discrimination" in which the Court itself played a role.[6] *Id.* at 684. Justice Brennan's plurality opinion quoted now-infamous language from the 1872 case *Bradwell v. Illinois*, which proclaimed that "'[m]an is, or should be, woman's protector and defender'"; that women's "natural and proper timidity and delicacy" render them "unfit[] for many of the occupations of civil life"; and that "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother." *Frontiero* at 684-85 (quoting *Bradwell*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (rejecting constitutional challenge to Illinois's refusal to admit a woman to the bar)). The *Frontiero* plurality observed that "[a]s a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes." 411 U.S. at 685.

At issue in *Frontiero* was a law that provided military benefits to wives of Air Force officers as a

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[6] In *Frontiero*, four Justices applied strict scrutiny to the challenged sex classification, one Justice concurred and concluded that the provision constituted "invidious discrimination," and three Justices concurred but found it unnecessary to determine whether strict scrutiny applied. *Frontiero*, 411 U.S. at 678, 691. Two years before *Frontiero*, in *Reed v. Reed*, 404 U.S. 71 (1971), this Court, "for the first time in our Nation's history ruled in favor of a woman who complained that her State had denied her the equal protection of its laws," *VMI*, 518 U.S. at 532 (citing *Reed*, 404 U.S. at 73), but did not expressly apply heightened scrutiny. *See Reed*, 404 U.S. at 74.

matter of course, but extended such benefits to husbands of Air Force officers only upon proof of their financial dependence on their wives. Applying heightened scrutiny to smoke out gender stereotypes, the Court recognized that the scheme was premised on the gender-based expectation that women were financially dependent on their husbands and concluded it violated the equal protection guarantee. In so doing, it directly rejected assumptions that this Court had relied on not only in 1872 but for many decades thereafter—assumptions that fundamental differences in the roles appropriate for women and men, rooted in women's traditional family responsibilities, justified laws limiting opportunities for women and reinforcing gender stereotypes. *E.g.*, *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding state law that made jury duty registration optional for women because "woman [was] still regarded as the center of home and family life"), *overruling recognized in J.E.B.*, 511 U.S. at 134 n.5; *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding statute prohibiting women from bartending unless they were a bar owner's wife or daughter because states were not precluded "from drawing a sharp line between the sexes" and "oversight . . . by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight"), *disapproved of by Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976); *cf. Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding legislation limiting women's work hours because "healthy mothers are essential to vigorous offspring, [and so] the physical well-being of woman becomes an object of public interest"), *overruling recognized in Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-30 (2003).

In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) [hereinafter "*Wiesenfeld*"], this Court further illuminated how laws based on gender stereotypes arbitrarily harm those who do not conform to those stereotypes. *Wiesenfeld* held unconstitutional a Social Security Act provision that required payment of benefits to a deceased worker's widow and minor children, but not to a deceased worker's widower. *Id.* at 637-39. First, the Court explained that the challenged provision's reliance on the "gender-based generalization" that "men are more likely than women to be the primary supporters of their spouses and children" devalued the employment of women, "depriv[ing] women of protection for their families which men receive as a result of their employment." *Id.* at 645. Second, the challenged provision "was intended to permit women to elect not to work and to devote themselves to the care of children." *Id.* at 648. The provision thereby failed to contemplate fathers such as Stephen Wiesenfeld, a widower who wished to care for his child at home. The Court emphasized that gender does not prescribe or limit parental roles, stating, "It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female." *Id.* at 652; *see also Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) [hereinafter "*Goldfarb*"] (holding unconstitutional differential treatment of widows and widowers based on "archaic and overbroad generalizations") (internal quotation marks omitted).

As these and other cases illustrate, laws that discriminate on the basis of sex are typically premised on gender stereotypes, including stereotypes of the family as properly or necessarily comprising a woman as homemaker and caretaker

and a man as breadwinner and protector.[7] In their failure to recognize that many men and women either do not wish to or are unable to conform to these roles, such laws arbitrarily limit individuals' ability to make fundamental decisions about their lives. By enforcing what Justice Bradley's *Bradwell* concurrence termed the "law of the Creator" that "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother," *Frontiero*, 411 U.S. at 685, such laws not only reflect an often inaccurate conclusion that this is how men and women do behave but also seek to impose a moral judgment that this is how men and women should behave. When the law enforces "assumptions about the proper roles of men and women," it closes opportunity, depriving individuals of their essential liberty to depart from gender-based expectations. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) [hereinafter "*Hogan*"]. Accordingly, "the test for determining the validity of a gender-based classification . must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25.

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[7] *See also Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding unconstitutional federal statute providing for support only in the event of father's unemployment based on stereotype that father is principal provider "while the mother is the center of home and family life") (internal quotation marks omitted); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations solely on husbands because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (finding unconstitutional state support statute assigning different age of majority to girls than to boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

These decisions make clear that "archaic and overbroad generalizations" cannot justify "statutes employing gender as an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). Such "loose-fitting characterizations" are "incapable of supporting . . . statutory schemes . premised upon their accuracy." *Id.* at 199. By requiring an "exceedingly persuasive" showing of a close relationship between a sex classification and a statutory scheme's objective, and by demanding that the objective be important (rather than merely legitimate), the Equal Protection Clause rejects the "artificial constraints on an individual's opportunity" imposed by laws resting on gender stereotypes, *VMI*, 518 U.S. at 533, and ensures that "generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description," *id.* at 550. In this way, heightened scrutiny recognizes that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . class." *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring) (alteration in original) (internal quotation marks omitted).

B. Laws That Discriminate Based on Sexual Orientation Should Be Subject to Heightened Scrutiny Because of Their Frequent Basis in Gender Stereotypes.

Just as laws that classify based on sex often improperly rest on and seek to impose stereotyped

gender-role expectations that do not hold true for all men and women, "same sex marriage prohibitions seek to preserve an outmoded, sex-role-based vision of the marriage institution, and in that sense . . . raise the very concerns that gave rise to the contemporary constitutional approach to sex discrimination." *Latta*, 771 F.3d at 487 (concurring opinion). Central among the gender-based expectations on which these prohibitions rest are the presumptions that a woman will and should form an intimate relationship and family with a man, not with a woman, and that a man will and should form an intimate relationship and family with a woman, not with a man. Courts have rejected gender stereotypes as a proper basis for lawmaking with regard to sex. Courts similarly should view these stereotypes and expectations with skepticism when reviewing the constitutionality of laws that discriminate based on sexual orientation.

1. Sexual Orientation Discrimination Is Rooted in Gender Stereotypes.

Laws that classify based on sexual orientation and laws that discriminate based on sex typically share a foundation in gender stereotypes or gender-based expectations. Many laws discriminating based on sexual orientation are founded on assumptions that men and women form (or should form) romantic, familial, or sexual relationships with each other, rather than with persons of the same sex. These assumptions have been at the root of laws prohibiting same-sex intimate conduct, as well as laws regarding family structure that discriminate based on sexual orientation, such as the marriage laws challenged here. Perhaps less apparent, but equally true, is that

such gender-based expectations underlie other forms of discrimination against lesbian, gay, and bisexual people too.

The notion that stigma and discrimination against lesbian, gay, and bisexual persons are premised on gender-role assumptions is a matter of common experience in our society. "There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235 (1994). "Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other." *Id.*; *see also Doe ex rel. Doe v. City of Belleville, Ill.*, 119 F.3d 563, 593 n.27 (7th Cir. 1997) ("There is, of course, a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand."), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998); *Henderson v. Labor Finders of Va., Inc.*, No. 3:12-CV-600, 2013 WL 1352158, at *5 (E.D. Va. Apr. 2, 2013) ("[A]s a result of the well-documented relationship between perceptions of sexual orientation and gender norms, gender-loaded language can easily be used to refer to perceived sexual orientation and vice versa."); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper

roles of men and women."). Individuals who depart from gender-based expectations are often targeted with antigay animus and slurs, regardless of their actual sexual orientation. Lesbian, gay, and bisexual people regularly experience social disapproval and discrimination that is targeted at their nonconformity with gender-based expectations—because they are not acting as "real men" or "real women" supposedly do.

Although the linkage between antigay stigma and gender-based expectations is apparent in ordinary life, courts have only recently begun to recognize its legal implications. For example, in considering whether lesbian, gay, and bisexual people could find recourse in federal statutes prohibiting discrimination based on sex, courts initially focused on the absence of express mention of sexual orientation in such laws. *See, e.g., Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (declining to apply Title VII to "sexual preference" discrimination claim because "the prohibition on sexual discrimination could not be extend(ed) . to situations of questionable application without some stronger Congressional mandate") (internal quotation marks omitted). More recently, however, an increasing number of courts understand that the discrimination lesbian, gay, and bisexual people experience in the workplace or in school can take the form of hostility toward nonconformity with gender stereotypes—which, as this Court recognized twenty-six years ago in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), constitutes sex discrimination. *See, e.g., Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290-92 (3d Cir. 2009) (holding harassment of gay man targeting his gender-nonconforming behavior and

appearance could constitute sex harassment); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (concurring opinion) (concluding gay man stated a claim for sex discrimination based on evidence that he was mocked by male co-workers because of his nonconformity with "gender-based stereotypes"); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding harassment of male employee for failing to act "as a man should act," including being derided for not having sex with female colleague, constituted actionable sex discrimination based on nonconformity with gender stereotypes); *Terveer v. Billington*, 34 F Supp. 3d 100, 114-16 (D.D.C. 2014) (holding gay man stated sex discrimination claim where he alleged discrimination due to his nonconformity with gender stereotypes); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012) (holding an allegation that manager harassed employee because he took his male spouse's surname stated claim based on sex stereotyping); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (explaining that harassment claims premised on antigay epithets and plaintiff's alleged failure to conform to gender stereotypes could proceed to trial under Title IX's sex discrimination prohibition); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223-25 (D. Or. 2002) (denying employer's motion for summary judgment on Title VII sex discrimination claim in case where supervisor repeatedly used antigay slurs); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (holding plaintiff stated Title IX sex discrimination claim because he alleged fellow students targeted him "not only because they believed him to be gay, but

also because he did not meet their stereotyped expectations of masculinity").

As one district court has noted:

> Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men.

Centola, 183 F. Supp. 2d at 410. This jurisprudence recognizes that discrimination faced by lesbian, gay, and bisexual people, as well as transgender people, will often be based on gender stereotypes.

Federal agencies charged with enforcement of civil rights laws also have recently emphasized that discrimination experienced by lesbian, gay, bisexual, and transgender people is often discrimination based on nonconformity with gender-based expectations—and in these circumstances such discrimination constitutes sex discrimination.[8] For example, the

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[8] Indeed, several federal agencies have concluded that discrimination on the basis of gender identity is per se sex discrimination. *See, e.g.*, Memorandum from Attorney Gen. Eric

United States Department of Labor's Office of Federal Contract Compliance Programs has recently proposed new sex discrimination regulations addressing employment decisions made on the basis of sex-based stereotypes, noting, "Sex-based stereotyping may have even more severe consequences for transgender, lesbian, gay, and bisexual applicants and employees, many of whom report that they have experienced discrimination in the workplace." Housing Trust Fund, 80 Fed. Reg. 5246, 5252 (Jan. 30, 2015). The Civil Rights Division of the United States Department of Justice has issued guidance explaining that federal employment, housing, education, and other statutes that prohibit discrimination based on sex "protect[] all people (*including LGBTI people*) from . discrimination based on a person's failure to conform to stereotypes associated with [a] person's real or perceived gender." U.S. Dep't of Justice, Civil Rights Div., Protecting the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Individuals (Feb. 11, 2013), *available at* http://www.justice.gov/crt/publications/lgbtibrochure.pdf. The United States Department of Education's Office for Civil Rights has explained that harassment of students "on the basis of their LGBT status" is prohibited by Title IX, 20 U.S.C. §§ 1681-1688, when such harassment is motivated by "sex-stereotyping." Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, to Colleagues, at 7-8 (Oct. 26, 2010),

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Holder to United States Attorneys, Head of Department Components (Dec. 15, 2014) (stating the Department now considers discrimination against transgender individuals a form of sex discrimination barred by Title VII); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (same).

available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. The United States Department of Housing and Urban Development has similarly construed the sex discrimination prohibition in the Fair Housing Act, 42 U.S.C. §§ 3601-3619.2. *See* Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5666 (Feb. 3, 2012) ("[T]he Fair Housing Act's prohibition of discrimination on the basis of sex prohibits discrimination against LGBT persons in certain circumstances, such as those involving nonconformity with gender stereotypes.").

In addition, the United States Equal Employment Opportunity Commission has reasoned that Title VII's "broad prohibition of discrimination 'on the basis of sex' will offer coverage to gay individuals in certain circumstances," including where an employee is discriminated against "based on the perception that he does not conform to gender stereotypes of masculinity." *Couch v. Chu*, No. 0120131136, 2013 WL 4499198, at *7-8 (E.E.O.C. Aug. 13, 2013) (quoting *Baker v. Astrue*, No. 0120110008, 2013 WL 1182258 (E.E.O.C. Jan. 11, 2013)); *see also id.* at *7 ("[S]ince *Price Waterhouse*, every court of appeals has recognized that disparate treatment for failing to conform to gender-based expectations is sex discrimination and has also concluded that this principle applies with equal force in cases involving plaintiffs who are gay, bisexual, heterosexual, or transgender."); *Culp v. Napolitano*, No. 0720130012, 2013 WL 2146756, at *3-4 (E.E.O.C. May 7, 2013) (concluding allegation of sexual orientation discrimination was a claim of sex discrimination because supervisor was motivated by gender stereotypes that women should have

relationships only with men); *Castello v. Donahoe*, No. 0120111795, 2011 WL 6960810, at *2-3 (E.E.O.C. Dec. 20, 2011) (concluding discrimination based on stereotype that women should have sexual relationships only with men can constitute sex discrimination); *Veretto v. Donahoe*, Appeal No. 0120110873, 2011 WL 2663401, at *3 (E.E.O.C. Jul. 1, 2011) (holding discrimination based on the stereotype that a man should not marry another man can constitute sex discrimination).

Just as courts and agencies have recognized in the context of statutory antidiscrimination protections that *Price Waterhouse*'s anti-stereotyping principle will often protect lesbian, gay, and bisexual people from discrimination, so must courts consider the implications of the anti-stereotyping principle underlying constitutional protections against sex discrimination for laws that discriminate based on sexual orientation. Laws that discriminate based on sexual orientation are, at their core, based on "'fixed notions'" about the roles, preferences, and capacities of women and men of the sort that have been repeatedly rejected in sex discrimination cases under the Equal Protection Clause. *VMI*, 518 U.S. at 541 (quoting *Hogan*, 458 U.S. at 725). Such discrimination improperly seeks to impose gender-based expectations on how men and women structure their lives.

2. Government Action That Discriminates Based on Sexual Orientation Warrants Heightened Scrutiny.

Lesbian, gay, and bisexual people long have had important life opportunities foreclosed by state action

seeking to enforce gender-based expectations in connection with the most intimate of human relationships. As with measures seeking to enforce outdated gender stereotypes on the basis of sex, courts should require at least "an 'exceedingly persuasive justification,'" *VMI*, 518 U.S. at 531 (quoting *Hogan*, 458 U.S. at 724), for classifications based on sexual orientation. Heightened scrutiny for such laws follows straightforwardly from precedents identifying relevant factors in determining whether a particular classification warrants close judicial scrutiny, rather than simple deference to majoritarian lawmaking. *See generally San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (reciting "traditional indicia of suspectness"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting considerations that "may call for a . . more searching judicial inquiry"); *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) [hereinafter "*Windsor v. United States*"] (explaining why lesbian, gay, and bisexual persons meet definition of a quasi-suspect class), *aff'd*, 133 S. Ct. 2675 (2013). That is so because measures discriminating on the basis of sexual orientation typically bear little or no relation to the actual abilities, capacities, or preferences of the persons that they constrain or burden.

In *Windsor*, this Court observed that the question of what level of scrutiny applies to sexual orientation discrimination is "still being debated and considered in the courts." 133 S. Ct. at 2683. Nearly two years later, courts across the country have spoken with a strong voice. In that case, the Second Circuit had concluded that the federal Constitution requires heightened scrutiny of laws that discriminate based on sexual orientation, a holding that stands given

this Court's affirmance of its judgment. *Windsor v. United States*, 699 F.3d at 181. Post-*Windsor*, four of five federal appellate courts and all but two of the over 40 federal district courts to consider laws that ban same-sex couples from marrying or prohibit recognition of same-sex couples' out-of-state marriages have found these laws violate the Constitution. Many have concluded these prohibitions are subject to heightened scrutiny under the Equal Protection Clause because they constitute discrimination on the basis of sexual orientation and that they fail, or are likely to fail, this test.[9] *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014) (holding that Indiana's and Wisconsin's marriage bans unconstitutionally deny equal protection under heightened scrutiny and also are "irrational" discrimination and fail rational basis review), *cert. denied*, 135 S. Ct. 316 (2014); *Latta*, 771 F.3d at 468

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[9] Other courts have struck down these laws as an unconstitutional denial of the fundamental right to marry, *e.g.*, *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert denied*, 135 S. Ct. 265 (2014). Applying heightened scrutiny, the highest courts of California, Connecticut, Iowa, and New Mexico also invalidated marriage bans under their state constitutions. *See In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 476 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013). Post-*Windsor* courts also have concluded that rational basis review applies but that these laws fail to pass muster even under this deferential standard; *see e.g.*, *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1295 (N.D. Okla.), *aff'd on other grounds sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied* 135 S. Ct. 271 (2014); *Searcy v. Strange*, No. 14-0208-CG-N, 2015 WL 328728, at *1, *4 (S.D. Ala. Jan. 23, 2015); *Campaign for S. Equal. v. Bryant*, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570, at *28-34 (S.D. Miss. Nov. 25, 2014).

(applying heightened scrutiny to strike down Idaho's and Nevada's marriage bans); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1289 (N.D. Fla. 2014) (noting that states' asserted interests would fail intermediate scrutiny, and that arguments they would fail rational basis review as well were "persuasive"); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 428, 431 (M.D. Pa. 2014) (finding Pennsylvania's marriage bans are subject to and violate heightened scrutiny); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wis.) (holding that because sexual orientation is "most similar to sex among the different classifications that receive heightened protection . . [the court] will assume that intermediate scrutiny applies"), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 652 (W.D. Tex. 2014) (finding plaintiffs' argument for heightened scrutiny compelling but unnecessary to the equal protection claim "since Texas' ban on same-sex marriage fails even under the most deferential rational basis level of review"); *see also Searcy*, 2015 WL 328728, at *3 (noting a strong argument can be made that classification based on sexual orientation is suspect); *Campaign for S. Equal.*, 2014 WL 6680570, at *28 (observing that intermediate scrutiny was most appropriate, though circuit precedent required rational basis review). *But see Conde-Vidal v. Garcia-Padilla*, No. 14-1253 PG, 2014 WL 5361987, at *10 (D.P.R. Oct. 21, 2014) (upholding Puerto Rico's marriage ban); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 919-20 (E.D. La. 2014) (upholding Louisiana's marriage bans under rational basis review).

Heightened scrutiny is particularly appropriate in this context because laws that impose gender-role expectations in contravention of the actual

preferences of individuals offend the central liberty interest on which this Court focused in *Lawrence* and *Windsor*. In *Lawrence*, this Court reaffirmed that "'matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,'" and that "'[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'" 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). The Court in *Lawrence* was emphatic that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do," *id.*, and in *Windsor*, the Court expressly noted that state marriage laws permitting same-sex couples to marry reflect "evolving understanding of the meaning of equality," 133 S. Ct. at 2692-93. The Constitution's liberty and equality principles are mutually reinforcing and are incompatible with a presumption of constitutionality for the legally enforced expectation that individuals should enter into intimate relationships only with someone of a different sex.

An essential component of the Constitution's due process and equal protection guarantees is that the government cannot exclude individuals from important social statuses, institutions, relationships, or legal protections because of a characteristic that is irrelevant to participation in such statuses, institutions, relationships, or protections. *See, e.g.*, *Frontiero*, 411 U.S. at 686-87. Courts therefore must look with skepticism upon laws that restrict access to marriage based on overbroad gender stereotypes and

prescribed gender roles unrelated to the actual capacity of persons to engage in mutual care and protection, to share economic risks, and to raise children together—capacities that do not turn on sexual orientation. Because legal enforcement of these stereotypes and roles arbitrarily constrains individuals' most fundamental and personal choices about their own lives, the Constitution requires vigorous interrogation of any such government action.

C. Laws Excluding Same-Sex Couples From Marriage Cannot Survive Heightened Scrutiny.

Marriage laws were once a leading example of sex-based rules that enforced separate gender roles for men and women and deprived persons of equal opportunities based on notions of what was moral, proper, or divinely ordered. As the harm arising from laws requiring adherence to stereotyped gender roles has been recognized, sex-based marriage rules have been almost completely dismantled, with one glaring exception: Many states continue to exclude same-sex couples from marriage. *See Latta*, 771 F.3d at 489-90 (concurring opinion). The Equal Protection Clause promises lesbian, gay, and bisexual persons, as it promises all persons, "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society." *VMI*, 518 U.S. at 532. Subjecting such laws, including marriage laws that discriminate based on sexual orientation, to heightened scrutiny is appropriate so that each person may have equal opportunity to aspire to and experience a relationship with the person whom he or she most wishes to build a life.

1. Heightened Scrutiny Has Been Key to Dismantling Sex-Specific Marriage Laws That Once Enforced Gender Stereotypes.

Historically, "the husband and wife [were] one person in law: the very being or legal existence of the woman [was] suspended . or at least [was] incorporated and consolidated into that of the husband . . . ." 1 William Blackstone, *Commentaries on the Laws of England* 442 (3d ed. 1768); *see* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11 (2000). For example, wives could not contract or dispose of their assets without their husbands' cooperation. Even after the Married Women's Property Acts and similar laws gave married women increased control over their property in the nineteenth century, many state and federal statutes continued to rely on the notion that marriage imposed separate (and unequal) roles on men and women. *See generally* Deborah A. Widiss, *Changing the Marriage Equation*, 89 Wash. U. L. Rev. 721, 735-39 (2012). Indeed, courts routinely invalidated efforts by spouses to "alter the 'essential' elements of marriage" through contractual arrangements seeking to modify its "gender-determined aspects." Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 15 & n.24 (1991).

An extensive legal framework continued to set out gender-specific rules relating to marriage well into the second half of the twentieth century. In 1971, for example, an appendix to the appellant's brief in *Reed v. Reed* listed numerous areas of state law that disadvantaged married women, including mandatory disqualification of married women from

administering estates of the intestate, qualifications on married women's right to engage in independent business, limitations on the capacity of married women to become sureties, differential marriageable ages, and domiciles of married women following that of their husbands. Brief for Appellant, app. at 69-88, *Reed v. Reed*, 404 U.S. 71 (June 25, 1971) (No. 70-4) (collecting state laws in each area). Many states' criminal laws retained the common law presumption that wives could not be raped by their husbands. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev. 1373, 1375 (2000). Federal law also persisted in attaching different legal consequences to marriage for men and women. For example, across a variety of federal programs, benefits were provided to wives on the assumption that they were financially dependent on their husbands, but denied to husbands altogether unless they could prove financial dependence on their wives. *See, e.g.*, *Goldfarb*, 430 U.S. at 201; *Wiesenfeld*, 420 U.S. at 643-44; *Frontiero*, 411 U.S. at 678; *Kalina v. R.R. Ret. Bd.*, 541 F.2d 1204, 1209 (6th Cir. 1976), *aff'd*, 431 U.S. 909 (1977). The Social Security Act presumed income from a trade or business in a community property state to be the husband's income. *See Carrasco v. Sec'y of Health, Educ. & Welfare*, 628 F.2d 624, 627, 629 (1st Cir. 1980). Federal bankruptcy law provided that alimony and support debts owed to a wife were nondischargeable, while the same debts owed to a husband lacked such protection. *See In re Crist*, 632 F.2d 1226, 1229, 1232-33 (5th Cir. 1980).

In the intervening years, courts applying heightened scrutiny have played a key role in dismantling the legal machinery that enforces

separate gender roles within marriage, based on the principle that such legally enforced roles do not properly reflect individuals' "ability to perform or contribute to society" and thus violate "'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)); *see also Kirchberg v. Feenstra*, 450 U.S. 455, 458-61 (1981) (affirming invalidation of Louisiana statute giving the husband as "head and master" the right to sell marital property without wife's consent); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147-48 (1980) (rejecting stereotypes regarding wives' financial dependency in the context of differential workers' compensation benefits); *Westcott*, 443 U.S. at 89 (finding unconstitutional a statute providing benefits only to unemployed fathers, rather than to both fathers and mothers); *Orr*, 440 U.S. at 281-83 (rejecting stereotypes regarding wives' financial dependency in the alimony context). As a result of these decisions and attendant legislative reforms, laws relating to marriage have become almost wholly gender-neutral—apart from their frequent exclusion of same-sex couples. *See generally Latta*, 771 F.3d at 490 (concurring opinion); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 Stan. L. & Pol'y Rev. 97, 113-14 (2005). Men and women entering into marriage today have the liberty under law to determine for themselves the responsibilities

each will shoulder, regardless of whether these roles conform to traditional arrangements.

2. Like Other Marriage Laws Enforcing Gender-Based Expectations, Laws Excluding Same-Sex Couples From Marriage Cannot Survive Constitutional Scrutiny.

Although the law no longer expressly imposes separate roles on married men and women, marriage laws that discriminate based on sexual orientation continue to rest on gender stereotypes about the proper preferences, relationship roles, and capacities of men and women that do not reflect the realities of many individuals' lives. For example, in Tennessee, the challenged marriage ban expressly delineates families headed by opposite-sex couples as "the fundamental building block of our society," Tenn. Code Ann. § 36-3-113(a), and the State has asserted the ban is justified by the "promotion of family continuity and stability." Brief for Appellant at 25, *Tanco v. Haslam*, No. 14-5297 (6th Cir. May 7, 2014). In passing Kentucky's marriage law, legislators argued that "[t]he sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God." *See* Pl.'s Mem. in Supp. of Mot. for Summ. J. at 4, *Bourke v. Beshear*, 3:13-CV-750-JGH (W.D. Ky. Dec, 16, 2013). Similarly, in passing Ohio's first marriage-recognition ban, legislators argued it was necessary to uphold "a divine institution that's been given to us by God" and that "males and females coming together in traditional marriage create the basic unit, the building blocks of our society." Expert Decl. of Susan

J. Becker in Supp. of Pl.'s Mot. for Declaratory J. and Permanent Inj. ¶ 40, *Obergefell v. Wymyslo*, No. 1:13-cv-501 (S.D. Ohio Oct. 11, 2013) (ECF No. 41-1) (internal quotation marks omitted). Such justifications reflect the gender-stereotyped notion that the stability of marriage depends on the separate roles played by women and men, and require skeptical examination under the Equal Protection Clause.

Respondents have argued that procreation is a principal reason for marriage and will not be furthered by recognition of same-sex marriages. *See* Brief for Appellant at 52, *DeBoer v. Snyder*, No. 14-1341 (6th Cir. May 7, 2014); Brief for Appellant at 11-12, *Bourke v. Beshear*, No. 14-5291 (6th Cir. May 7, 2014); Brief for Appellant at 24-26, *Tanco v Haslam*, No. 14-5297 (6th Cir. May 7, 2014). Tennessee, for example, has argued that "marriage can simply not be divorced from its traditional procreative purposes" and that the ban on marriage between same-sex couples serves to "ensure that procreation occur only within the confines of a stable family unit." Defs.' Resp. in Opp'n to Pls.' Mot. for Preliminary Inj. at 14-17, 24, *Tanco v. Haslam*, No. 3:13-cv-01159 (M.D. Tenn. Dec. 6, 2013). Similarly, Kentucky asserts that recognizing marriages only between different-sex couples is justified because only "[t]raditional man-woman couples" can procreate. Brief for Appellant at 21, *Bourke*, No. 14-5291 (6th Cir. May 7, 2014); *see also* Brief of Amicus Citizens for Community Values at 15, *Obergefell v. Wymyslo*, No. 14-3057 (6th Cir. Apr. 17, 2014) (arguing that procreation is the primary reason for marriage and that granting recognition to marriages between same-sex couples will diminish responsible procreation).

Same-sex couples, of course, may become parents through adoption, assisted reproduction, or surrogacy, or they may raise biological children from prior different-sex relationships. Moreover, as this Court has recognized, marriage has many other core purposes beyond procreation, including emotional support, public commitment, and personal dedication, as well as tangible benefits such as Social Security and property rights. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (holding prison inmates must be allowed to marry, even if marriages might never be consummated). Cases holding that married couples have a right to use contraception, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), and that women cannot be required to notify their spouses to obtain an abortion, *Casey*, 505 U.S. at 898, further illustrate that marriage and procreation are not coextensive. *See generally id.* at 849 ("[T]he Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood . . . as well as bodily integrity . "). Indeed, a description of marriage as based primarily on procreation is one that most married couples would fail to recognize.

Relatedly, the contention that permitting same-sex couples to marry could harm child welfare is based on pervasive gender stereotypes. *See Bostic*, 760 F.3d at 383-84; *Latta*, 771 F.3d at 491-92 (concurring opinion); *see also* Brief for Appellant at 51, *DeBoer*, No. 14-1341 (6th Cir. May 7, 2014) (allowing same-sex marriage would undermine child welfare because "no institution in society would reinforce the idea . . that mothers and fathers have, in general, different parenting strengths"). Courts repeatedly have struck down laws based on the assumption that mothers and

fathers play categorically and predictably different roles as parents, rejecting "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979); *see also Wiesenfeld*, 420 U.S. at 652 ("It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."); *Stanley v. Illinois*, 405 U.S. 645, 646-47, 649 (1972) (finding unconstitutional a state's presumption that single fathers were unfit to raise their children where single mothers were presumed fit). Gender-based generalizations about how mothers and fathers typically parent are an insufficient basis for discriminatory laws, even when these generalizations are "not entirely without empirical support." *Wiesenfeld*, 420 U.S. at 645. Here, empirical evidence does not support the notion that different-sex couples are better parents than same-sex couples; indeed, research supports the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted"—a finding that "is accepted beyond serious debate in the field of developmental psychology." *Perry*, 704 F. Supp. 2d at 980.[10]

While evidence does not support the notion that permitting same-sex couples to marry will harm children, banning same-sex couples from marrying or preventing recognition of same-sex couples'

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[10] Like the *Perry* court, the trial court in the instant case *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), also held a bench trial on this question and found an overwhelming consensus among scholars that there is no difference in quality of parenting between heterosexual and gay parents.

marriages does inflict serious harms on same-sex couples and their children. These harms include not only denial of substantial tangible benefits and responsibilities, but also dignitary harms of constitutional dimension. *Windsor*, 133 S. Ct. at 2694-95 (explaining how the federal government's refusal to recognize same-sex couples' marriages "demeans" such couples and "humiliates" their children). *Windsor* instructs that in evaluating for constitutional purposes the harms that discriminatory marriage laws inflict, dignitary harms are of great moment.

One of the most serious ways in which laws that exclude same-sex couples from marriage demean lesbian, gay, and bisexual persons is by enforcing gender-based expectations in the roles that men and women play in families. State enforcement of such stereotypes and expectations—through exclusionary marriage laws and other discriminatory government actions—communicates to lesbian, gay, and bisexual persons, their children, and their communities that there is something wrong with a core part of their identity and being. Such government actions communicate that lesbian, gay, and bisexual persons do not measure up to what a man or a woman should be and that their most important relationships are "less worthy," *Windsor*, 133 S. Ct. at 2696, than the relationships and marriages of different-sex couples. Such discrimination cannot survive heightened scrutiny.

IV. CONCLUSION

For the foregoing reasons, Amici Curiae urge this Court to hold that laws that classify based on sexual orientation are subject to heightened scrutiny under

the Equal Protection Clause and that the challenged laws cannot withstand this scrutiny, and to reverse the judgment of the Court of Appeals upholding the challenged provisions.

Respectfully submitted,

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APPENDIX

APPENDIX

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or Amicus Curiae in a range of cases before the Supreme Court and Federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of the Constitution's guarantees of equal protection of the laws. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by the Constitution.

Williams Institute Scholars of Sexual Orientation and Gender Law

The Amici professors of law are associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These Amici have substantial expertise in constitutional law and equal protection jurisprudence, including with respect to discrimination based on sex, sexual orientation, and

gender stereotypes. Their expertise thus bears directly on the constitutional issues before the Court in these cases. These Amici are listed below. Institutional affiliations are listed for identification purposes only.

- Christine A. Littleton
    - Vice Provost for Diversity and Faculty Development, UCLA;
    - Professor of Law and Gender Studies, UCLA School of Law;
    - Former Faculty Chair and Faculty Advisory Committee Member, The Williams Institute.
- Nancy Polikoff
    - Professor of Law, American University Washington College of Law;
    - 2012 Visiting McDonald/Wright Chair of Law, UCLA School of Law;
    - Former Faculty Chair & Faculty Advisory Committee Member, The Williams Institute.
- Vicki Schultz
    - Ford Foundation Professor of Law and Social Sciences, Yale Law School;
    - 2011 Visiting McDonald/Wright Chair of Law, UCLA School of Law;

  - Former Faculty Chair & Faculty Advisory Committee Member, The Williams Institute.

- Brad Sears
  - Assistant Dean of Academic Programs and Centers, UCLA School of Law;
  - Roberta A. Conroy Scholar of Law and Policy, The Williams Institute;
  - Executive Director, The Williams Institute.
- Seana Shiffrin
  - Professor of Philosophy, UCLA School of Law;
  - Pete Kameron Professor of Law and Social Justice, UCLA School of Law;
  - Faculty Advisory Committee Member, The Williams Institute.
- Jonathan D. Varat
  - Professor of Law Emeritus, UCLA School of Law;
  - Dean Emeritus, UCLA School of Law;
  - Faculty Advisory Committee Member, The Williams Institute.

- Adam Winkler
    - Professor of Law, UCLA School of Law;
    - Faculty Advisory Committee Member, The Williams Institute.

California Women Lawyers

California Women Lawyers ("CWL") has represented the interests of more than 30,000 women in all facets of the legal profession since 1974. CWL's mission includes advancing women's interests, extending universal equal rights and eliminating bias. In pursuing its values of social justice and gender equality, CWL often joins amici briefs challenging discrimination by private and government entities, weighs in on proposed legislation, and implements programs fostering the appointment of women and other qualified candidates to the bench.

Center for Reproductive Rights

The Center for Reproductive Rights (the "Center") is a global advocacy organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the U.S., the Center's work focuses on ensuring that all women have access to a full spectrum of high-quality reproductive healthcare services. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, and its attorneys have regularly appeared before this Court. As a rights-based organization, the Center has a vital

interest in protecting individuals endeavoring to exercise their fundamental rights from restrictions on the basis of gender stereotypes. Using its expertise in U.S. constitutional law, discrimination, and equal protection jurisprudence, the Center seeks to highlight why discrimination based on gender classifications or gendered stereotypes should be subject to heightened scrutiny.

Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights. As one of the leaders in Connecticut's fight for marriage equality and subsequent victor, CWEALF's research and advocacy includes the role of gender stereotypes and the prevention of discrimination based on gender, sexual orientation, and gender identity.

Equal Rights Advocates

Equal Rights Advocates ("ERA") is a national nonprofit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant gender discrimination cases in both state and federal courts, and by engaging in other advocacy. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment, which often have been justified by or based on stereotypes and biased assumptions about the roles that women (and men) can or should play in the public and private sphere, including within the institution of marriage. ERA is concerned that if laws such as those challenged in this case are allowed to stand, millions of gay, lesbian, and bisexual persons in the United States will be deprived of the fundamental liberty to choose whether and whom they will marry—a deprivation that offends the core principle of equal treatment under the law.

Michigan Association for Justice

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged in litigation and trial work. The mission of the Michigan Association for Justice is to promote a fair and effective justice system. MAJ recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of the United States of America, including the Sixth Circuit. This case presents important issues of law, the resolution of which is important to civil and constitutional rights, and will have a direct and substantial impact on MAJ members' clients whose rights may be challenged by these issues, requiring heightened scrutiny by the Courts.

National Association of Women Lawyers

The National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the United States. Founded in 1899, the association promotes not only the interests of women in the profession but also women and families everywhere. That has included taking a stand opposing gender stereotypes in a wide range of areas, including Title IX and Title VII. NAWL is proud to have been a signatory to the civil rights amicus brief in the 2003 case of *Goodridge v. Department of Public Health*, where the Massachusetts Supreme Judicial Court found that denial of marriage licenses to same sex couples violated state constitutional guarantees of liberty and equality. Now, over a decade later, NAWL is proud to join in this brief and stand, once again, for marriage equality.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs as Amicus Curiae in the Supreme Court and in the Federal Courts of Appeals to protect constitutional and legal rights.

Women's Bar Association of the District of Columbia

The Women's Bar Association of the District of Columbia (WBA) is one of the oldest and largest voluntary bar associations in metropolitan Washington, D.C. WBA's mission is to maintain the honor and integrity of the profession; promote the administration of justice; advance and protect the interests of women lawyers; promote their mutual improvement; and encourage a spirit of friendship among our members. The WBA is dedicated to advance women's rights in furtherance of an equal and just society.

Women's Bar Association of Illinois

The Women's Bar Association of Illinois (WBAI) was founded in 1914 to promote, foster, advance and protect the interest and welfare of women and women lawyers. An essential element of the WBAI's mission is to aid in the enactment of legislation to protect the interests and rights of women. The WBAI has long advocated for individual rights and liberties including the elimination of discriminatory laws predicated upon gender stereotypes and gender based expectations. The WBAI joins the brief as amicus curiae before this Honorable Court on behalf of the parties whose rights are in jeopardy.

Women's Law Center of Maryland

The Women's Law Center of Maryland, Inc. is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education and implementation of innovative legal-services programs to pave the way for systemic change. The Women's Law Center has dedicated substantial advocacy efforts to reform family law through its Kaufman Center for Family Law. The Women's Law Center is participating as an amicus in *Obergefell v. Himes* because it supports the right of same sex couples to marry. This is a necessary and appropriate expansion of family law which makes the rights, benefits and responsibilities of marriage available to all women, including lesbians who wish to marry, and ensure that those

rights are not restricted on the basis of gender stereotypes.

Women Lawyers Association of Michigan

Women Lawyers Association of Michigan ("WLAM") was founded in 1919. WLAM works to secure the rights of women in society. The mission statement for WLAM is to advance the interests of women members of the legal profession, to promote improvements in the administration of justice, and to promote equality and social justice for all people. WLAM has participated as Amicus Curiae in cases to secure equal treatment of women under the law. With more than 700 member attorneys, judges and law students, WLAM has substantial expertise related to equal protection, including discrimination based on sex. WLAM has an interest in the continued recognition by Courts that sex classifications warrant heightened scrutiny under the Equal Protection Clause of the Constitution. WLAM supports the Amicus Brief provided by the National Women's Law Center to the extent that all people should be afforded the rights provided under the Equal protection Clause of the United States Constitution.